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No. ___

IN THE

Supreme Court of the United States

UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC; LOCAL 12L, UNITED STEELWORKERS OF AMERICA; and MADE IN THE USA FOUNDATION,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Do the federal courts lack the authority, on political question grounds, to determine whether approval of international commercial agreements like the North American Free Trade Agreement may, consistent with the Constitution, be accomplished by a bicameral simple majority vote, or, by reason of the Treaty Clause, must be accomplished by securing the "Advice and Consent of the Senate" through the concurrence of "two thirds of the Senators present"?

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Petitioners respectfully request that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Eleventh Circuit in *Made in the USA Foundation v. United States of America*, 242 F.3d 1300 (11th Cir. No. 99-13138).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 242 F.3d 1300, and is reproduced in the Appendix to this Petition ("App.") at 1a. The opinion of the United States District Court for the Northern District of Alabama is reported at 56 F. Supp. 2d 1226, and is reproduced at App. 37a.

JURISDICTION

The Court of Appeals decision and judgment were entered on February 27, 2001. On May 21, 2001, Justice Kennedy entered an order extending the time in which to file a certiorari petition seeking review of that decision up to and including June 28, 2001. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND TREATIES INVOLVED

Article II, Section 2, Clause 2 of the United States Constitution—the Treaty Clause—provides as follows:

> The President . . . shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . .

The North American Free Trade Agreement ("NAFTA" or the "Agreement"), is printed at 32 I.L.M. 289-456, 605-799 (1993). The statute "approv[ing]" and providing for the implementation of NAFTA is codified in principal part at 19 U.S.C. §§ 3301-3473. Copies of both NAFTA and the

NAFTA legislation have been lodged with the Clerk, together with the President's Statement of Administrative Action and the Message from the President transmitting those materials to Congress.

STATEMENT OF THE CASE

A. NAFTA's Provisions, and the Process Through Which They Were Put Into Effect

1. On December 17, 1992, the United States, Mexico and Canada reached a North American Free Trade Agreement ("NAFTA") and President William Jefferson Clinton signed NAFTA on behalf of the United States.

NAFTA's more than six hundred pages of provisions (exclusive of lengthy supporting appendixes) are arranged into twenty-two separate chapters as follows.

- Chapters 1-2 establish NAFTA's objectives and its scope of application; as to the latter, Article 201 defines a "measure," which is subject to NAFTA's various substantive provisions, as any "law, regulation, procedure, requirement or practice" of a NAFTA country, including, unless specifically excluded, state, provincial and local measures. 32 I.L.M. 298.

- Chapters 3-5 eliminate tariffs and non-tariff barriers on virtually all trade in goods among the United States, Mexico and Canada and obligate each NAFTA country to accord "national treatment" (*i.e.*, the same treatment as would be given to domestic goods) to the goods of the other NAFTA countries. 32 I.L.M. 299-364.

- Chapter 6 broadly prohibits limitations on trade in energy and basic petrochemical goods among the NAFTA countries, and imposes substantive restrictions on those countries' energy regulatory measures. 32 I.L.M. 364-368.

- Chapters 7 and 9 impose procedural and substantive restrictions on NAFTA country agricultural support

measures, 32 I.L.M. 368-377, on the basis for, and the application of, food and plant health and safety measures, 32 I.L.M. 377-383, and on all other measures (such as consumer and environmental protection measures) that directly or indirectly affect trade, 32 I.L.M. 386-393.

• Chapters 8 and 19 restrict the enforcement among the NAFTA countries of fair trade antidumping and countervailing duty laws, 32 I.L.M. 682-693, and limit the circumstances under which a NAFTA country may take emergency actions to protect domestic producers, 32 I.L.M. 383-386.

• Chapter 10 establishes procedural and substantive restrictions on government procurement by the NAFTA countries, invalidating, *inter alia*, "Buy American" and "local development" requirements. 32 I.L.M. 613-639.

• Chapter 11 requires NAFTA country governments to extend "national treatment" to investors from other NAFTA countries, 32 I.L.M. 639-649, and grants investors extraordinary protection from regulation that is deemed to constitute an "expropriation" or "unfair treatment," *see infra* at 5-6.

• Chapter 12 requires NAFTA country governments to extend "national treatment" to all service providers, and imposes substantive restrictions on the basis for, and the application of, service provider licensing and certification requirements. 32 I.L.M. 649-653.

• Chapters 13-17 impose substantive requirements on measures adopted by a NAFTA country concerning: access and use of public telecommunications, 32 I.L.M. 653-657, cross-border trade in financial services, 32 I.L.M. 657-663, anticompetitive business conduct, 32 I.L.M. 663-664, temporary entry of persons, 32 I.L.M. 664-670, and intellectual property, 32 I.L.M. 670-681.

- Chapters 18, 20 and 21 establish a NAFTA administrative superstructure including a trinational Free Trade Commission, national secretariats to support the work of the Commission, and a score of committees and working groups charged with implementing NAFTA. 32 I.L.M. 681-682, 693-702.

- Chapter 22 specifies the conditions under which NAFTA enters into and remains in force. 32 I.L.M. 702-703.

Chapter 20 sets out the central NAFTA enforcement mechanism, providing for binding international arbitration over the validity of any actual or proposed measure of a NAFTA country that another signatory contends "is or would be inconsistent with" NAFTA, or that would impair "any benefit" the complaining country "could reasonably have expected" under NAFTA. Art. 2004, 32 I.L.M. 694. An arbitration panel ruling against the challenged measure requires that the defendant NAFTA country take action to have the measure "remov[ed]" or suspended "[w]herever possible," *id.*, Art. 2018(2), 32 I.L.M. 697, including a lawsuit brought by the United States against an offending state or locality if necessary. *See* 19 U.S.C. §§ 3312(b)(2) (reserving to the federal government the right to bring such a lawsuit).

Most recently Mexico invoked Chapter 20 to successfully challenge the United States' refusal to open its borders to Mexican trucking companies. *See* North American Free Trade Agreement Arbitral Panel Established Pursuant to Chapter 20, *In the Matter of Cross-Border Trucking Services* ¶¶ 295-98 (Secretariat File No. USA-MEX-98-2008-01) (February 6, 2001). Although the United States pointed to significant inadequacies in Mexican truck safety requirements—*e.g.*, no limitations on drivers' hours of work, no regular truck inspections, and no truck equipment requirements, *id.* ¶¶ 78-79, 95-98—and argued that it was not

possible for the United States to inspect every Mexican truck crossing the border, *id.* ¶ 155, the Panel found "the inadequacies of the Mexican regulatory system . . . insufficient" to justify the United States' refusal to comply with NAFTA Chapter 12's requirements of national treatment with respect to service providers. *Id.* ¶ 296.

NAFTA Chapter 20 is supplemented by two other significant enforcement mechanisms. First, Chapter 19 enables a signatory country to challenge in binding international arbitration any amendment to another signatory's antidumping or countervailing duty statutes that is claimed to be "inconsistent with . . . the object and purpose of [NAFTA]," Article 1902, 32 I.L.M. 682, and also enables not only signatories, but private parties as well, to challenge antidumping and countervailing duty determinations made by the domestic agencies that administer those statutes, including, for example, the United States Department of Commerce. *See* Article 1904, 32 I.L.M. 683-684. NAFTA bars federal court review of agency determinations that have been challenged under Chapter 19, giving rise to a "unique process by which [the United States] ha[s] agreed to have binational panels of private sector experts substitute for our courts in reviewing . . . final [administrative] determinations."[1]

Second, NAFTA Chapter 11 enables private parties from one NAFTA country who contend that their "investments" (a term NAFTA defines very broadly) have been "directly or indirectly . . . expropriat[ed]" by some action of another NAFTA country, or that they have not received "fair and equitable treatment," to present their claims to an international arbitration panel. Articles 1105, 1110(1), 32

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[1] *U.S. Fights First NAFTA Extraordinary Challenge Over Cement*, Inside U.S. Trade (April 28 2000) (quoting Charles E. Roh, Jr., Assistant United States Trade Representative for North American Affairs).

I.L.M. 639-41. In a Chapter 11 proceeding, the offending country can be required to pay damages and costs to a successful private complainant. Article 1135, 32 I.L.M. 643. Private parties have successfully invoked these NAFTA provisions to overturn a land use decision by a Mexican local government[2] and to force the repeal of a Canadian provincial environmental measure.[3] NAFTA Chapter 11 cases are now pending that challenge, among other things, a California environmental regulation[4] and a Mississippi state court judgment.[5]

2. By its terms, NAFTA was to "enter into force" only after "an exchange of written notifications certifying [that each country had] complet[ed the] necessary legal procedures." Article 2203, 32 I.L.M. 702. In that regard,

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[2] *See Final Arbitration Award under NAFTA Chapter 11 to Metalclad Corporation against the United Mexican States* (dated September 2, 2000) (ordering Mexico to pay $16.8 million to a hazardous waste company after a local government refused to permit the operation of a hazardous waste site in its jurisdiction due to environmental concerns) (available at www.naftaclaims.com).

[3] *See* Courtney Tower, *Canada Backs Away from United States Firm's NAFTA Challenge*, J. of Com. at 4A (July 22, 1998); *Canada Settles NAFTA Dispute by Lifting Ban on Gasoline Additive*, Inside U.S. Trade (July 24, 1998).

[4] *See Notice of Intent to Arbitrate Claim under Article 1119 of NAFTA filed by Methanex Corporation* (July 2, 1999) (asserting $970 million claim against the United States based on California Executive Order banning the use of a certain gasoline additive due to environmental concerns) (available at www.naftaclaims.com).

[5] *See Loewen Group, Inc. v. United States of America*, ICSID Case No. ARB (AF)/98/3 (January 5, 2001) (holding that a Mississippi state trial court judgment awarding $500 million in punitive damages against a Canadian company was a "measure" that could be challenged under NAFTA Chapter 11, as was the Mississippi Supreme Court's refusal to waive its bonding requirement for appealing that judgment) (available at www.naftaclaims.com).

President Clinton submitted legislation to Congress to "approv[e] and [to] mak[e] statutory changes required or appropriate to implement the Agreement." H.R. Doc. No. 103-159, Message From the President Transmitting NAFTA, Implementing Bill and Statement of Administrative Action ("President's Message"), at 450 (1993).

As to approval, the legislation, as presented and as enacted, states that "the Congress approves . . . the North American Free Trade Agreement entered into on December 17, 1992, with the Governments of Canada and Mexico." 19 U.S.C. § 3311.

As to implementation, where a NAFTA provision required modifications in the laws of the United States the legislation makes such a modification. *See, e.g.*, 19 U.S.C. § 3331 (authorizing the President to modify U.S. tariff levels as "necessary or appropriate to carry out or apply articles 302, 305, 307, 308, and 703 and Annexes 302.2, 307.1, 308.1, 300-B, 703.2, and 703.3 of [NAFTA]"); 19 U.S.C. § 1516a(g)(2) (eliminating judicial review of antidumping and countervailing duty determinations challenged under NAFTA Chapter 19).

But the implementing legislation goes to only certain of NAFTA's requirements. As detailed above, by and large NAFTA's provisions are complete in themselves, establishing binding requirements to be enforced by international tribunals rather than by U.S. courts, and thus requiring no such implementing legislation. For example, "[n]o change in statute [was] required to implement the provisions of [NAFTA] Chapter 11," President's Message at 598, despite Chapter 11's substantial impact on domestic laws, *see supra* at 5-6.

The NAFTA legislation was passed by a vote of 234 to 200 in the House, and 61 to 38 in the Senate. App. 38a. By reason of that congressional action—and despite the fact that

less than two thirds of the Senators present concurred in approving NAFTA—President Clinton certified to Mexico and Canada that the United States had completed the necessary legal procedures to bring NAFTA into force. Upon certification from those countries to the same effect, NAFTA "entered into force," Article 2203, 32 I.L.M. 702, binding the United States as a matter of international and domestic law to comply with NAFTA and all its provisions unless and until the United States withdraws from the Agreement after providing six months' notice as required by Article 2205, 32 I.L.M. 703.[6]

B. The Origin of the Two Thirds Senate Approval Requirement in the Treaty Clause, and the Nation's Practice Thereunder

1. From the earliest drafts of the Constitution presented to the Constitutional Convention of 1787, the treatymaking power, including the power "to make treaties of commerce," was among those "powers destined for the Senate peculiarly." 2 M. Farrand, *The Records of the Federal Convention of 1787* at 144-45 (1911) (quoting Edmund Randolph's memorandum for the Committee on Detail).[7] But the kind of majority that

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[6] The Government's position is that only the President or his designee would be authorized to give such notice, and that "[t]here is no provision in the Agreement, the NAFTA Implementation Act . . ., or the Constitution that requires the President to consult with Congress" regarding withdrawal. Defendant's Answers to the Court's May 10, 1999 Questions, District Court Dkt. No. 35, at 3.

[7] The larger states were dissatisfied with the exclusion of the House of Representatives from treatymaking, because granting sole power to the Senate in which all states had equal representation meant that "[t]he larger states would not have the weight to which they felt entitled when it came to the making . . . of commercial treaties." Arthur Bestor, *Respective Roles of Senate and President in the Making and Abrogation of Treaties - The Original Intent of the Framers of the Constitution Historically Examined*, 55 Wash. L. Rev. 1, 95 (1979). *See also* Jake Rakove, *Making*

should be required for the Senate's consent was an open and controversial question.

Under the Articles of Confederation, the consent of nine states—two thirds of the confederation—had been required to make a treaty. In August of 1786, just one year prior to the Constitutional Convention, the southern states had successfully invoked that check on the treaty power to stave off a proposed agreement with Spain that would have traded interests dear to the south – free navigation of the Mississippi and certain territorial demands—for trade arrangements beneficial to the north. *See* John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 Colum. L. Rev. 1955, 2011-13, 2059-68 (1999); Bestor, 55 Wash. L. Rev. at 60-68, 97-110; Charles Warren, *The Mississippi River and the Treaty Clause of the Constitution*, 2 Geo. Wash. L. Rev. 271 (1934). The clash over the proposed treaty was heated, resulting in what has been described as "the gravest sectional crisis in the history of the Confederation." Bestor, *supra* at 64.

When, a year after the Spanish treaty controversy, the Treaty Clause was up for consideration, debate focused on whether the two thirds requirement should be retained to protect regional economic interests.

As initially proposed by the Committee on Detail, a simple majority of the Senate would have sufficed to consent to the making of a treaty. 2 Farrand at 183. But the failure to include a supermajority requirement provoked opposition as soon as the draft was reported to the Convention. On his printed copy of the draft, George Mason wrote: "As Treaties

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Foreign Policy—The View from 1787 in Foreign Policy and the Constitution, at 8-9 (Goldwin and Licht eds., 1990). However, "the small states would not consent to confederate without an equal voice in the formation of treaties." 3 Farrand at 347-48 (quoting George Davie in the North Carolina ratification debate).

are to be the Laws of the Land & *commercial* Treaties may be so framed as to be partially injurious, there seems to be some necessity for the Same Security upon this subject as in [the provision concerning navigation acts]," for which a two thirds supermajority requirement had been proposed. Bestor, *supra* at 101 (quoting 4 Farrand at 53 (emphasis added)).

When the Treaty Clause was referred to the Committee on Postponed Parts, that Committee dropped the two thirds requirement for navigation acts but added it for treaties. 2 Farrand at 453, 495, 498-99. The latter change provoked a lengthy debate when the draft returned to the floor, with James Wilson of Pennsylvania objecting to allowing "the power of a minority to control the will of a majority." 5 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, at 524 (1845). But after further debate and consideration of several proposals to modify the two thirds requirement in some respect,[8] the delegates settled on the Treaty Clause in its present form. *Id.* at 526-528.

In Federalist No. 64, John Jay explained the Convention's determinations regarding the Treaty Clause by stating that "[t]he power of making treaties is an important one, especially as it relates to war, peace, and *commerce*; and it should not be delegated but in such a mode, and with such precautions, as will afford the highest security that it will be exercised by men the best qualified for the purpose, and in the manner most conducive to the public good." Federalist No. 64 (Clinton Rossiter ed.,

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[8] The proposals ran the gamut from a proposal that treaties be approved by a simple majority, to proposals that approval should require the consent of two thirds of the entire Senate. 5 Elliot at 526-528. The decision to require approval only of two thirds of those *present* was controversial, leading some delegates to propose that the Constitution should stipulate that the members of the Senate would be provided "previous notice" of any impending vote on a treaty "and a reasonable time for their attending." 2 Farrand at 550.

1961), at 390 (emphasis added). In Federalist No. 75, Alexander Hamilton added that the Treaty Clause "secure[d] the advantage of numbers in the formation of treaties." The Federalist No. 75, at 453. And, in a public essay written in support of ratification, Roger Sherman put the point thus: "the rights of the state will be as well secured under the new constitution as under the old [*i.e.*, the Articles of Confederation]," because "[i]t is provided by the constitution that *no commercial treaty shall be made by the president without the consent of two thirds of the senators present.*" *Essays on the Constitution Published During its Discussion by the People 1787-88*, at 235 (P.L. Ford ed., 1892) (emphasis added).

2. During the Framer's era and for a hundred and fifty years thereafter, the nation's practice was consistent: all international commercial agreements were submitted to the Senate for approval under the Treaty Clause. 1 Laurence H. Tribe, *American Constitutional Law*, at 654 (3d ed., 2000). *See also* David M. Golove, *Against Free-Form Formalism*, 73 N.Y.U. L. Rev. 1791, 1940 (1998) (explaining that "the first hundred and fifty years of practice were unequivocal" in this regard); Yoo, *supra*, at 1965 ("Until the turn of the century, government leaders, judges and academics regarded the Treaty Clause as the exclusive mechanism for entering into international agreements.").

By the 1940's, however, a number of political leaders and academics had come to view the Treaty Clause process for making international agreements, and particularly the Clause's supermajority requirement, as a "failure in the original constitutional design," Bruce Ackerman and David M. Golove, *Is NAFTA Constitutional?*, 108 Harv. L. Rev. 799, 802 (1995), and a "mistak[e] . . . that must be chalked up against the Framers," *id.* at 866 (quoting Edwin S. Corwin, *The President: Office and Powers: History and Analysis of Practice and Opinion*, at 234-235 (1940)). This view

generated efforts to amend the Constitution to eliminate the Treaty Clause process, and particularly its requirement of two thirds Senate approval. In 1945 those efforts resulted in a House of Representatives proposal for a constitutional amendment requiring all treaties to be approved by a simple majority in both Houses rather than by two thirds of the Senate. *See* Ackerman and Golove *supra* at 802, 862-866, 886, 889-890. Attempts to secure an amendment ceased at that point. *See id.* at 865, 889-890. What ensued instead was an "informal process, which yielded the modern congressional-executive agreement," approved by a bicameral simple majority, as a professed substitute for treaties approved by the Treaty Clause process. *Id.* at 802.

Since the 1940's, an increasing number of international agreements have been treated as such congressional-executive agreements, to the point where "the treaty has been largely abandoned for trade agreements." 1 Tribe, *American Constitutional Law*, at 652-656. The constitutionality of that practice has never been addressed by this Court.

C. Proceedings Below

The action was brought by the United Steelworkers of America and its Local 12L (collectively "the Union"), Made in the USA Foundation ("the Foundation"), and three individuals, alleging that NAFTA had been adopted unconstitutionally because the Agreement had not been approved by two thirds of the Senate.

The Government moved to dismiss the complaint for lack of standing and as presenting a political question. While the motion to dismiss was pending, the parties filed cross-motions for summary judgment on the merits.

The district court held that the petitioner organizations had standing but that the individual plaintiffs did not. App. 52a-

53a, 88a-89a.[9] The district court rejected the Government's political question argument, concluding that petitioners' claim presented a legal question of constitutional interpretation that the courts have "the authority and responsibility to determine." App. 138a.

On the merits, the district court concluded that NAFTA was adopted in a constitutional manner, reasoning that Congress's power under the Foreign Commerce Clause, coupled with the President's inherent Article II authority over foreign affairs, are sufficient to grant the political branches the authority to make international agreements such as NAFTA by bicameral simple majority approval of the agreement as negotiated by the President. App. 224a-231a.

On appeal, the Eleventh Circuit affirmed the rulings below as to petitioners' standing, but declined to reach the merits, "finding that with respect to international commercial agreements such as NAFTA, the question of just what constitutes a 'treaty' requiring Senate ratification presents a nonjusticiable political question." App. 3a.

The Eleventh Circuit declared that "the issue involve[s] resolution of questions committed by the text of the Constitution to a coordinate branch of government." App. 22a (quoting *Goldwater v. Carter*, 444 U.S. 996, 998

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[9] The Union alleged—and pointed to "considerable evidence, much of it from government sources," App. 11a—that NAFTA has caused and is continuing to cause a loss of jobs and a reduction of wages in the industries where the Union represents American workers. The Foundation, which promotes American-made products, was aggrieved by the adoption of NAFTA because "a return to the pre-NAFTA regime would likely result in the greater availability of U.S.-made products for purchase by the U.S. consumers, at least in [certain] markets." App. 12a. The three individual plaintiffs claimed standing on the ground that their Senators' votes against NAFTA had been denied proper effect, but the district court held that this did not establish a basis for "voter standing," and that issue was not pursued on appeal.

(1979) (Powell, J., concurring)). The "text[s]" cited by the court below were those delineating the President's "role as Chief Executive . . . and as Commander in Chief" and "his power to 'appoint Ambassadors . . . and Consuls' . . . and 'to receive Ambassadors and other public Ministers,'" as well as "Congress's enumerated powers in the realm of external affairs . . . 'to declare war,' . . . 'to provide and maintain a navy' . . . [and] 'to regulate commerce with foreign nations.'" App. 23a. The Eleventh Circuit further concluded that petitioners' claims fall outside the realm of "judicial expertise," App. 26a, because of the difficulty of defining what constitutes a "treaty" for purposes the Treaty Clause.

Noting, *inter alia*, NAFTA's importance, the Eleventh Circuit opined that certain "prudential factors . . . further counsel[] against judicial intervention in the present case." App. 34a. But that court ultimately rested its holding on the following grounds:

> We . . . conclude that in the context of international commercial agreements such as NAFTA—given the added factor of Congress' constitutionally-enumerated power to regulate commerce with foreign nations, as well as the lack of judicially manageable standards to determine when an agreement is significant enough to qualify as a "treaty"—the issue of what kinds of agreements require Senate ratification pursuant to Art. II, § 2 procedures presents a nonjusticiable political question.

App. 36a.

REASONS FOR GRANTING THE WRIT

This challenge to the constitutionality of the bicameral simple-majority approval of the North American Free Trade Agreement—in the words of the House Ways and Means Committee, "the most comprehensive trade agreement ever negotiated"[10]—raises the question whether such international agreements are, by reason of the Treaty Clause, subject instead to the "Advice and Consent of the Senate" and thus to the requirement that "two thirds of the Senators present concur."

The Eleventh Circuit, by treating that constitutional question as a non-justiciable political question, has answered it in favor of the bicameral simple-majority approval process by default.

The Court of Appeals' decision is doubly wrong—first of all on the scope and nature of the political question doctrine, as set against "the province and duty of the judicial department to say what the law [and most particularly the constitutional law] is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); and second of all on the scope and nature of the Treaty Clause. These grave errors call for this Court's attention and correction.

In the nearly 40 years since this Court's seminal explication of the "political question" doctrine in *Baker v. Carr*, 369 U.S. 186 (1962), the Court has repeatedly and uniformly rejected "political question" defenses where, as here, the plaintiff challenges governmental action as contrary to a constitutional provision fairly and properly construed. None of the Eleventh Circuit's justifications for its qualitative expansion of the political question doctrine can be squared with this Court's decisions or with this Court's elaboration of

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[10] H.R. Rep. No. 103-361, at 8 (1993) (reprinted in 1993 U.S.C.C.A.N. at 2558).

the political question doctrine in those decisions. And, there is no need to belabor the point that the Eleventh Circuit's political question ruling works a concomitant diminution of the judicial role in interpreting the Constitution's mandates and in maintaining the constitutional rule of law.

This is, moreover, the least appropriate of cases to go by political question default. The constitutionality of the recent practice of treating the approval of "congressional-executive agreements" by a bicameral simple-majority vote as a permissible substitute for approval of international agreements by two thirds of the Senate pursuant to the Treaty Clause has generated a vigorous constitutional debate – but, to this point, no authoritative judicial determination.[11]

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[11] *Compare* Myers S. McDougal and Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 Yale L.J. 181 (1945) (arguing that "congressional-executive agreements," adopted by a simple majority of both Houses, are "interchangeable" with treaties, thus obviating the need for two thirds Senate approval), *with* Edwin Borchard, *Shall the Executive Agreement Replace the Treaty?*, 53 Yale L.J. 664 (1944) (refuting the McDougal/Lans thesis); *and compare* Ackerman and Golove, *Is NAFTA Constitutional?*, *supra*, 108 Harv. L. Rev. at 803, 807, 808 (acknowledging that the Framers intended to require two thirds Senate approval of all binding international agreements, and characterizing McDougal and Lans' contrary contention as a "myth," but arguing that a "constitutional moment" in the 1940's "introduce[d] the congressional-executive agreement as a legitimate alternative to treaty-making," enabling the political branches to cast aside "[t]he Founders' 'antidemocratic' and 'outmoded' decision to privilege 'one third plus one' of the Senate"), *with* Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 Harv. L. Rev. 1221 (1995) (criticizing the Ackerman/Golove thesis as resting on the notion that the Constitution may be amended through informal expressions of popular will), *and* 1 Tribe, *American Constitutional Law*, at 653 (arguing that, "in light of the Treaty Clause's requirement of ratification by two thirds of the Senate, bicameral simple-majority approval of agreements that would otherwise

It is petitioners' submission that the constitutional text, illuminated by the unusually clear and detailed Constitutional Convention and ratification materials, establishes that an international agreement like NAFTA must be approved by two thirds vote of the Senate as provided for in the Treaty Clause. But whether we are right or wrong, our submission—and the question we raise—is one that goes to the heart of the Constitution's structural framework for making international agreements, just as the Presentment Clause submission in *INS v. Chadha*, 462 U.S. 919 (1983), and the question it raised, went to the heart of the Constitution's structural framework for making domestic legislation.

Professor Paul has succinctly and accurately explained the central importance of the two thirds requirement to the system of international lawmaking established by the Constitution:

> The Constitution requires a two thirds vote of the Senate in order to check the President's negotiating power. The super-majority was a normative requirement that changed the dynamics of the ordinary legislative process. When the President knows that the agreement can be rejected by any thirty-four senators, he must insist on negotiating terms that command broad support; whereas he is not under the same negotiating pressure if he submits the agreement as a congressional-executive or sole executive agreement.
>
> * * * *
>
> The Constitution creates obstructions to forming treaties for good reasons: both to protect state law from being readily overturned by foreign agreements and to discourage entangling alliances. Though the United States plays a larger role in the world today than it did in

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fall within the constitutional 'treaty' category appears inconsistent with the Constitution's design").

> 1789, there is still wisdom in not undertaking foreign commitments lightly.
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> * * * *
>
> Finally, because treaties are the supreme law of the land, and are difficult to change without the participation of the other contracting parties, the Constitution requires two-thirds of the Senate to ensure that changes in domestic law reflect the will of a broad majority.

Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 Calif. L. Rev. 671, 725-726 (1998).

It follows, as Professor Tribe has rightly recognized, that:

> Although Congress had for five decades used the legislative veto, Jagdish Chadha was entitled to claim the Constitution's protections in challenging such a veto .... And the American people, whether regarded collectively or as the citizens of their respective states, are similarly entitled to the safeguards provided by the Senate supermajority requirement of the Treaty Clause.

Tribe, *Taking Text and Structure Seriously*, 108 Harv. L. Rev. at 1282.

Given all this, the Treaty Clause question here deserves—we would say requires—a judicial answer on the merits in this case and not the Eleventh Circuit's "political question" non-answer.

I. THE DECISION BELOW IMPROPERLY EXPANDS THE "POLITICAL QUESTION" DOCTRINE AND IMPROPERLY CONSTRICTS THE AUTHORITY OF THE FEDERAL COURTS TO INTERPRET AND ENFORCE THE CONSTITUTION'S PROVISIONS

Precisely because "it is emphatically the province and duty of the judicial department to say what the law is," *Marbury*, 5 U.S. (1 Cranch) at 177, there is little room for a doctrine that would deny the federal courts the authority to decide questions of constitutional interpretation on the ground that the matter is "political." *See Baker v. Carr*, 362 U.S. at 210-217, 229-232. And this is no less the case where foreign relations are involved. *See Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221, 229-30 (1986) (question whether federal court should "command the . . . Executive Branch . . . to dishonor and repudiate an international agreement" was *not* political); *Dames & Moore v. Regan*, 453 U.S. 654, 682 (1981) (ruling on the validity of an international agreement, without suggesting that the question might be "political"); *United States v. Pink*, 315 U.S. 203, 222-23, 228-30 (1942) (same); *United States v. Belmont*, 301 U.S. 324, 327-31 (1937) (same). *See generally Baker v. Carr*, 362 U.S. at 211-213.

That being so, where a claim is grounded in constitutional text it is justiciable, and it matters not that the text may be difficult or that the claim involves fundamental institutional interests of other branches of government and challenges the manner in which those branches have chosen to conduct their affairs. *See, e.g., Baker v. Carr; United States v. Munoz-Flores*, 495 U.S. 385, 395-96 (1990) (challenge to Congress' determination that a particular bill was not for raising revenue, and therefore did not have to originate in the House, did not present a political question); *Chadha*, 462 U.S. at

940-53 (1983) (challenge to statutory legislative veto provision did not present a political question); *Powell v. McCormack*, 395 U.S. 486, 548-49 (1969) (challenge to House's expulsion of a member did not present a political question); *Uhler v. AFL-CIO*, 468 U.S. 1310, 1312 (1984) (Rehnquist, J., in Chambers) (challenge to procedures followed in connection with proposed amendment to the Constitution did not present a political question). *See also Clinton v. City of New York*, 524 U.S. 417 (1998) (adjudicating challenge to statutory line-item veto provision, implicitly determining that no political question was presented); *Bowsher v. Synar*, 478 U.S. 714 (1986) (adjudicating separation-of-powers challenge to statutory deficit-reduction procedure, implicitly determining that no political question was presented).[12]

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[12] So far as we have been able to determine, since *Baker v. Carr* was decided there have been only two instances in which this Court has found a case to present a nonjusticiable political question: *Gilligan v. Morgan*, 413 U.S. 1 (1973), in which the plaintiff sought to have a district court exercise ongoing supervision over the Ohio National Guard ungrounded in any constitutional standards, *see id.* at 5-12; and *Nixon v. United States*, 506 U.S. 224 (1993), in which this Court held that Art. I, § 3, cl. 6, which provides that "[t]he Senate shall have the sole Power to try all Impeachments," does not give the courts a warrant to require the entire Senate, rather than a committee, to participate in the evidentiary phase of an impeachment proceeding.

The Eleventh Circuit erred in viewing *Goldwater v. Carter*, 444 U.S. 996 (1979), as a third such instance. *See* App. 27a. Only four Justices found that the question presented in *Goldwater*—concerning the *abrogation* of a treaty—was "political;" and in reaching that conclusion those Justices emphasized that, "while the Constitution is express as to the manner in which the Senate shall participate in the ratification of a treaty, it is silent as to that body's participation in the abrogation of a treaty." 444 U.S. at 1003 (Rehnquist, J., concurring in judgment). Even so, Justice Powell rejected the contention that the question to be decided was political: "Resolution of the question may not be easy, but it only requires us to apply normal principles of interpretation to the constitutional

In *Baker v. Carr*, this Court explained that "[t]he nonjusticiability of a political question is primarily a function of the separation of powers," 369 U.S. at 210, and that it therefore is germane to inquire into "the appropriateness under our system of government of attributing finality to the action of the political departments," *id.* (quoting *Coleman v. Miller*, 307 U.S. 433, 454-55 (1939)). In this case, it is perfectly obvious that it is *not* appropriate to grant the political branches the last word as to whether a particular kind of international agreement requires two thirds Senate approval. After all, the two thirds rule is, on its face, a check on the majoritarian political processes. It would be perverse in the extreme to conclude that the question whether to abide by that rule is remitted to those majoritarian processes. *See Powell*, 395 U.S. at 548-49 (refusing to allow the House to "exclude" a member on less than a two-thirds vote, as this would "effectively nullify the Convention's decision to require a two-thirds vote for expulsion"); *Nixon v. United States*, 506 U.S. 224, 229-236 (1993) (dictum) (indicating that the requirement that any conviction in an impeachment proceeding must be by a two thirds vote is judicially enforceable).

Nor is this a situation in which there has been "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker*, 369 U.S. at 217. As to Article II, that the President has general authority for the conduct of foreign affairs, *see* App. 23a, and specific authority to appoint and to receive ambassadors, *id.*, hardly suggests any power in the President to make treaties "[regardless of whether] two thirds of the Senators present

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provisions at issue." *Id.* at 999 (Powell J., concurring in judgment). *See also id.* at 1007 (Brennan, J., dissenting) ("The issue of decisionmaking authority must be resolved as a matter of constitutional law, not political discretion; accordingly, it falls within the competence of the courts.").

[do or do not] concur." As to Article I, Congress's authority to declare war and to raise armies, *see* App. 23a, has nothing to do with the making of international commercial agreements; and the Framers explicitly *rejected* the notion that the Foreign Commerce *legislative* power, which the court below deemed "[m]ost significant[]," *id.*, confers any authority to make commercial *agreements*. *See infra* at 25-27.

In the end, the "textual commitment" discerned by the Eleventh Circuit reduces to the generalized observation that "[t]he Constitution confers a vast amount of power upon the political branches of the federal government in the area of foreign policy—particularly foreign commerce." App. 23a. That observation provides no ground for negating the Constitution's conferral on the judicial branch of the authority to require that the political branches adhere to the Constitution in the making of international agreements. Here, as in *Chadha*, 462 U.S. at 940-941, the issue is not "[t]he plenary authority of Congress [or the President] over [a subject] . . ., but whether Congress [or the President] has chosen a constitutionally permissible means of implementing that power."

The Eleventh Circuit also misapplied *Baker v. Carr's* teaching that a question is "political" if there is "a lack of judicially discoverable and manageable standards for resolving it." 369 U.S. at 217. As the court below acknowledged, while the Constitution does not state in detailed specifics that the Treaty Clause is the exclusive means of adopting international commercial agreements like NAFTA that does not make this case any different from numerous cases in which this Court has held that the construction of constitutional provisions—whether clear or ambiguous—is a matter for the courts. App. 29a-31a (discussing *Munoz-Flores*; *Chadha*; *Powell*; *Morrison v. Olson*, 487 U.S. 654, 671 (1988); and *Freytag v.*

Commissioner of Internal Revenue, 501 U.S. 868, 880-883 (1991)).

To be sure, the Eleventh Circuit declined to be guided by those decisions because "none of the[m] ... took place directly in the context of our nation's foreign policy, and in none of them was the constitutional authority of the President and Congress to manage our external political and economic relations implicated." App. 31a. But this amounts to a declaration that every case challenging governmental action affecting foreign relations must be considered to present a political question. That proposition is as erroneous under *Baker v. Carr*'s "manageable standards" prong as it is under the "textual commitment" prong.

Assuming the doubtful proposition, *see Goldwater v. Carter*, 444 U.S. at 999 (Powell, J., concurring in judgment), that there might be a case in which it would be proper to deem a question "political" merely because of the difficulty of construing the applicable constitutional text, this is not such a case. The interpretive difficulties here are more imagined than real. The historical materials establish that the Framers intended the Treaty Clause to provide the exclusive means for making substantial international commercial agreements like NAFTA, *see supra* at 8-11, 17-18; *infra* at 24-27, and those materials serve to "fix[] the construction to be given [the Constitution's] provisions" and place this case squarely within the competence and responsibility of the judiciary to decide. *Printz v. United States*, 521 U.S. 898, 905 (1997) (quoting *Myers v. United States*, 272 U.S. 52, 175 (1926)). *See also, e.g., U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 789-815, 827, 832-33, 837-38 (1995); *Bowsher*, 478 U.S. at 723-24; *Chadha*, 462 U.S. at 946-51.

Indeed, insofar as the interpretive question involves the determination of what kind of international commercial agreement constitutes a "treaty," the question is a definitional one like those this Court has answered time and time again.

See, e.g., *Morrison v. Olson*, 487 U.S. at 671 (drawing "the line between 'inferior' and 'principal' officers as used in [the Appointments Clause] of the Constitution"—which appears in the same sentence of Article II, § 2 as the Treaty Clause—despite the fact that "the Framers provided little guidance into where it should be drawn"); *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 461-463 (1978) (drawing the line between compacts the states may enter into with congressional consent and "treaties, alliances and confederations" which they may not, despite acknowledging that the Framers' intention as to that distinction is far from clear).

Simply stated, judged by the standards this Court has enunciated, the Treaty Clause question here has hallmark of a justiciable constitutional question and none of the attributes of a political question.

II. THE DECISION BELOW RENDERS THE SUPERMAJORITY REQUIREMENT OF THE TREATY CLAUSE A DEAD LETTER WITH RESPECT TO INTERNATIONAL COMMERCIAL ACCORDS, IN DEFIANCE OF THE FRAMERS' INTENT

In addition to doing violence to "the province and duty of the judicial department to say what the law is," *Marbury*, the decision below does violence to the Treaty Clause itself. To hold that the federal courts have no power to decide whether "international commercial agreements such as NAFTA ... requir[e] Senate ratification," App. 3a, is to hold that the political branches are free to bypass the Treaty Clause process in making *any and all* commercial agreements, no matter how far-reaching, in favor of a bicameral simple majority process. That result defies the Framers' intent, which was to provide, in this special context, for "the power of a minority to control the will of a majority." *See supra* at 10 (quoting 5 Elliot at 524) (statement of James Wilson).

The Eleventh Circuit was of the view that, whatever force the Treaty Clause may have in other contexts, *see* App. 35a, the Clause may be ignored by the President and Congress whenever foreign commerce is involved, *see* App. 23a, 36a. That gets things precisely backwards.

The Treaty Clause process and its two thirds requirement were deemed essential precisely because "*commercial* Treaties may be so framed as to be partially injurious." *See supra* at 9-10 (quoting 4 Farrand at 53) (notes of George Mason) (emphasis added). "It [therefore] is provided by the constitution that *no commercial treaty* shall be made by the president without the consent of two thirds of the senators present." *Essays on the Constitution Published During its Discussion by the People 1787-88*, 235 (P.L. Ford ed., 1892) (statement of Roger Sherman) (emphasis added).

The Framers gave careful attention to the question of the possible interplay between the process for making *legislation* regulating foreign commerce, on the one hand, and the process for making *international commercial agreements*, on the other. The Framers' conclusion on the intersection between the two is directly at odds with the Eleventh Circuit's view that international commercial agreements can be made through the same process as domestic legislation regulating foreign commerce.

The Constitutional Convention's decision to exclude the House from treatymaking, *see supra* note 7, spawned a "lengthy, sophisticated, and detailed debate" over the relationship between legislation and treatymaking "that spanned several months" in the ratification process. *See* Yoo, 99 Colum. L. Rev. at 2058-59. Throughout that debate, Federalists and Anti-Federalists alike agreed that, under the Constitution, commercial *treaties* would be made solely by the President and the Senate pursuant to the Treaty Clause, but that, to the extent such an agreement required domestic

implementing legislation, the agreement could not be *implemented* unless such legislation subsequently was enacted by both Houses exercising their authority under the Foreign Commerce Clause. *See id.* at 2047-48, 2051-52, 2055-56, 2058-59, 2064-65.

As a prominent contributor to the ratification debates put it, "the true construction is, that the president and senate shall make treaties; but all commercial treaties shall be subject to be confirmed by the legislature. This construction will render the [Treaty and Commerce] clauses consistent." *Id.* at 2055.[13]

Shortly after the Constitution was ratified, the same understanding as to the relationship between treatymaking and legislation was expressed by virtually every participant in the momentous 1796 debate over whether the House should request the negotiation papers for the controversial Jay Treaty with Britain.[14]

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[13] The quoted statement is from a letter of the Federal Farmer, perhaps the most respected Anti-Federalist writer. *See* Yoo, 99 Colum. L. Rev. at 2058, n. 490. In the quoted passage, the Federal Farmer was explaining why he had come to agree with the Federalists' justification for excluding the House from treatymaking. *See id.* at 2055.

[14] Madison urged the House that "leaving with the President and Senate the power of making Treaties, but requir[ing] at the same time the Legislative sanction and co-operation, in those cases where the Constitution had given express and specific powers to the Legislature," gave effect "to every part of the Constitution," 1 Annals of Congress at 493-94, 4th Cong., 1st Sess. (House, 1796), neither "narrow[ing] too much the Treaty power," *id.* at 489, nor resulting in the "impracticable" outcome of permitting Congress to legislate and the President to make treaties on the same subject "concurrent[ly]" to different ends. *Id.*

The House as a body agreed with Madison's conception, passing the following resolution expressing its understanding as to the "meaning of the Constitution," *id.* at 782:

> *Resolved.* That it being declared by the second section of the second article of the Constitution "that the President shall have

The Eleventh Circuit's notion that international agreements may be made through a legislative exercise is entirely at odds with the Framers' view that "the formation of treaties . . . was not . . . a legislative act at all." 3 Farrand at 342 (John Spaight in the North Carolina ratification debates).[15]

Against this backdrop, the Eleventh Circuit's decision to read the Treaty Clause out of the Constitution insofar as international commercial agreements are concerned could not be more misconceived. And, that is what the Eleventh Circuit has done. It cannot be doubted that NAFTA—"the most comprehensive trade agreement ever negotiated," *see supra* at 15—is precisely the kind of international commercial agreement that the Framers determined may only be made with the approval of two thirds of the Senate. If the Treaty Clause does not have to be observed in making NAFTA it

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power, by and with the advice of the Senate to make Treaties, provided two-thirds of the Senate present concur," the House of Representatives do not claim any agency in making treaties; but that when a Treaty stipulates regulations on any of the subjects submitted by the Constitution to the power of Congress, it must depend, for its execution, as to such stipulations, on a law or laws to be passed by Congress. [*Id.* at 772].

[15] *See also* 2 *The Documentary History of the Ratification of the Constitution* at 459 (John P. Kaminsky & Gaspare J. Saladino eds., 1986) (Timothy Pickering observing in the Pennsylvania ratification debates that, "[a]ccording to the common acceptation of words, treaties are not part of the legislative power at all"). Hamilton provided the clearest explication of the distinction between legislative and treatymaking powers as the Framers conceived it: "[t]he essence of legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society . . . [by] the sovereign to the subject ," whereas the "objects [of treatymaking] are CONTRACTS with foreign nations . . . agreements between sovereign and sovereign." The Federalist No. 75, at 450-451 (Hamilton).

does not have to be observed in making any international commercial agreement.[16]

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be granted.

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[16] This Court has observed that the drafting of the Compact Clause "may have [been] informed," *U.S. Steel Corp.*, 434 U.S. at 462 n.12, by a distinction drawn by Emmerich de Vattel, "[t]he international jurist most widely cited in the first 50 years after the Revolution," *id.*, between "compacts" complete upon their making (*e.g.*, boundary settlements) and "treaties" requiring ongoing acts. *Id.* NAFTA is in the latter category. Other jurists of the period characterized treaties as agreements involving "subjects of great national magnitude and importance." *Id.* at 463 n.13 (quoting St. George Tucker). Again, NAFTA plainly is such an agreement. *See* 1 Tribe, *American Constitutional Law*, at 651-52 and n. 41 (explaining that, "[w]hatever the details of the distinction between treaties and other forms of agreements, one key should be the degree to which an agreement constrains federal or state sovereignty and submits United States citizens or political entities to the authority of bodies wholly or partially separate from the ordinary arms of federal or state government").